NO. 48518-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

ANDREW JENS PETER MORTENSEN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-00846-5

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

RESPONSE TO ASSIGNMENTS OF ERROR

I. **The trial court properly instructed the jury on the law of self-defense as it applied in this case.**

II. **The trial court did not abuse its discretion in excluding the testimony of Aisha Nottingham on a minor point for violating the exclusion order.**

III. **Mortensen received effective assistance of counsel.**

IV. **The reasonable doubt instruction was the correct statement of the law.**

V. **One of Mortensen's two convictions for Assault in the Second Degree pertaining to Scott Burkett should be dismissed.**

VI. **The trial court did not err in imposing the $200 filing fee.**

VII. **The Judgment and Sentence should be amended to reflect that Mortensen was convicted by jury verdict.**

VIII. **This court should decline to rule on the issue of appellate costs because it is not ripe.**

STATEMENT OF THE CASE

During the evening hours on July 5, 2014, three friends – Scott Burkett, Joshua McDonald, and Bianca Lujan went night fishing along the banks of a flushing channel that led out to the Columbia River in Vancouver, Washington. Report of Proceedings (RP) 125-27, 168-69, 216-18. McDonald and Lujan were in a dating relationship, and Burkett was their good friend of many years. RP 125-27, 168-69, 216-17. It was

McDonald's birthday, and he wanted to celebrate it by going fishing with his girlfriend and his good friend. RP 216-18.

Directly across the channel to the south was a group of campers, comprising of four adults and two children. RP 169-70, 613-14. The four adults were Andrew Mortensen; Mortensen's girlfriend, Aisha Nottingham; Aisha's brother, Michael Nottingham; and their mutual friend, Patricia Huddleston. RP 609-14. Mortensen and his group had been camping for several days, and the adults had consumed a substantial amount of alcohol. RP 614-16. Mortensen's group was playing rap or hip-hop music at a loud volume from his speed boat. RP 170. McDonald's group did not like the type of music or its high volume, and after about 45 minutes to an hour, yelled across the channel for Mortensen's group to turn down the volume. RP 170. Mortensen's group refused to turn down the music. RP172, 221-22. Each group then yelled insults and profanities toward the other across the water. RP 1112-14. After about 15 minutes of yelling across the channel at each other, the music stopped. RP 172, 222. McDonald made a comment similar to "Thank you for turning off the music, finally some peace and quiet." RP 288, 323.

Mortensen's group was upset over the yelling and comments from McDonald's group, and threatened to come over and shoot them. RP 173,

223, 289, 325-27. There was a male voice from Mortensen's group that asked for the gun and the clip. RP 289. Mortensen and Nottingham jumped in Mortensen's boat, fired it up, and sped across the channel toward Burkett's group. RP 132. Once the boat reached the north bank, Nottingham jumped off the boat and charged at McDonald, while Mortensen jumped off the boat and charged at Burkett. RP 132, 178. Nottingham tripped or lost his balance in the sand running toward McDonald, and McDonald ended up gaining the upper hand. RP 227-230.

Meanwhile, Mortensen swung his fist toward Burkett in an attempt to punch him. RP 179. Burkett was able to dodge Mortensen's punch, maneuvered around him, and placed his arm around Mortensen's neck in a chokehold from behind. RP 132, 179. Both Mortensen and Burkett then fell to the ground, with Burkett still maintaining his chokehold on Mortensen. RP 181.

As Mortensen was getting weaker and close to passing out, he reached into his waistband, pulled out a pistol, and racked the slide. RP 132-33, 181-82. Burkett heard the metallic sound of the slide being racked from Mortensen's pistol, saw the pistol in Mortensen's hand, let go of Mortensen, and backed away with his hands in the air. RP 182. As Mortensen got up from the ground, he swung his arm toward Burkett's face, striking and breaking Burkett's nose with the pistol. RP 182-83, 235.

Stunned by the pain, Burkett covered his bloody nose with his hands, bent over, and turned away. RP 183. Mortensen swung his arm again, striking the back of Burkett's head with the butt of the pistol. RP 183.

Burkett called to McDonald that Mortensen has a gun, and to stop fighting with Nottingham. RP 185. Mortensen then pointed the pistol at Burkett's forehead, and yelled, "Do you want to die?" RP 133-34, 184. McDonald looked up, saw Mortensen pointing the gun at Burkett, and let go of Nottingham. RP 230-31. Nottingham got up from the ground and came next to Mortensen, who then pointed the gun at McDonald, and also yelled at him, "Do you want to die?" RP 185-86, 232-33. The only person who was armed or had a weapon on the beach that night was Mortensen. RP 187, 1192. Mortensen then ordered McDonald and his friends to leave the beach. RP 237, 1142. Lujan became frantic and yelled that she was calling the police. RP 135, 184.

Mortensen and Nottingham then got into the boat and returned to their side of the channel. RP 187. After returning to their side of the channel, Mortensen and his group held a family meeting and concocted a story to tell the police and bury the gun. RP 294-95, 331, 629-30.

The police responded and eventually made contact with Mortensen's group in their campsite on their side of the beach. Mortensen initially told the police that he had a gun and that it was behind one of the

tents. He also told the police that it was the other group (Burkett and McDonald) who came across the channel in a raft and attacked them, and that he was defending himself. RP 602-03. Nottingham, Aisha Nottingham, and Huddleston also told the police the same fabricated story. RP 634-35, 865, 891-94, 972-73. The police found Mortensen's pistol buried behind one of the tents. RP 527. Mortensen and Nottingham were arrested and taken to jail. RP 894-95, 1157-58.

Mortensen testified on his own behalf at trial, and told a different version of the events. He testified that although there was yelling back and forth between his group and the group across the water over the music, it lasted only a few minutes, and then everything settled down. RP 1116-17, 1122. He claimed that he took Nottingham across the channel in his boat because Nottingham was going to pick up his daughter. RP 1117-18. When the boat approached the opposite bank, Nottingham jumped off the boat and disappeared. RP 1125. Mortensen next saw a large person dragging Nottingham away, and he jumped off the boat to help. RP 1127. As Mortensen was running toward Nottingham, he heard a sound behind him, swung his fist around him, and Burkett on the arm. RP 1127-28. Burkett then jumped on Mortensen's back and put him in a chokehold, and they both fell down, with Burkett still maintaining the chokehold on Mortensen. RP 1129-30. Mortensen felt himself beginning to pass out,

reached for his pistol, which had fallen out on the sand, and hit Burkett in the face over his shoulder. RP 1131-34. Burkett released Mortensen, turned toward McDonald, and told him to stop fighting because Mortensen has a gun. RP 1135-36. Mortensen then stood up, cleared the jam in his gun, stood with his gun at his side, and told Burkett and his friends to leave the beach. RP 1139-42. Mortensen denied pointing the gun at Burkett or McDonald, or threatening to shoot them. RP 1138-41, 1193-94. Mortensen and Nottingham then returned to their campsite. RP 1146.

Mortensen was convicted by the jury of two counts of Assault in the Second Degree pertaining to Burkett. CP 172-73; RP 1529-30. The jury also returned a special verdict for the second count of Assault in the Second Degree (Count 2), finding that Mortensen was armed with a firearm during the commission of that crime. CP 174; RP 1530. The jury acquitted Mortensen of the remaining counts. CP 175-181; RP 1530-32.

At sentencing, the State stipulated that the two counts of Assault in the Second Degree should be treated as same criminal conduct for purposes of calculating Mortensen's offender score. RP 1542, 1544-45. The trial court imposed a sentence of nine months for each count, both to run concurrently, and consecutively to the thirty six month firearm enhancement, for a total of 45 months. RP 1553; CP 190-91.

Mortensen subsequently filed the instant appeal.

ARGUMENT

I. The trial court properly instructed the jury on the law of self-defense as it applied in this case.

Mortensen contends that the trial court erred in refusing to instruct the jury on the law of defense of others. He claims that this deprived him the opportunity to fully argue his theory of the case. A review of the record reveals that the trial court properly instructed the jury on the law of self-defense, and properly denied to instruct the jury on defense of others, as it was not supported by the evidence.

"'Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law.'" *State v. Rodriguez,* 121 Wn. App. 180, 184–85, 87 P.3d 1201 (2004) (quoting *State v. Irons,* 101 Wn. App. 544, 549, 4 P.3d 174 (2000)). Jury instructions on self-defense must more than adequately convey the law. Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Walden,* 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed to be prejudicial. *Id.*

To be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self-defense; however, once the defendant produces some evidence, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt. *Walden,* 131 Wn.2d at 473. Moreover, evidence of self-defense is evaluated from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees. *Id.* at 474. This standard incorporates both objective and subjective elements. The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done. *Id.* The standards for the appropriateness of giving jury instructions on self-defense also apply to defense of others. *State v. Penn*, 89 Wn.2d 63, 65-66, 568 P.2d 797 (1977); *State v. Bernardy*, 25 Wn. App. 146, 148, 605 P.2d 791 (1980).

In this case, Mortensen admitted at trial that he struck Burkett's face with his pistol while Burkett had a chokehold around his neck as the two of them were struggling on the ground, and he felt the sensation of beginning to pass out. RP 1130-31, 1134. He also testified that up to that point, he had not produced the pistol, and had forgotten that he even had

his pistol on him, and that it must have fallen out when he and Burkett landed on the ground. RP 1131-32. After being struck in the face with the pistol, Burkett let go of Mortensen, covered his nose with hands, and turned away. RP 1135, 1190. Mortensen got up and cleared his pistol, because it was jammed. RP 1135, 37. Burkett yelled for McDonald to stop fighting because Mortensen had a gun. RP 1137, 1191. Mortensen also yelled at McDonald let go of Nottingham. RP 1137. Both Burkett and McDonald were unarmed, and had their arms in the air. RP 1138-1139, 1192-93. Mortensen believed the threat originally presented by Burkett and McDonald had been defused. RP 1192-93. Mortensen denied that he struck Burkett a second time on his head with the gun. RP 1191. More importantly, Mortensen categorically denied that he pointed his pistol at either Burkett or McDonald at any point, or threatened to shoot them. RP 1138-41, 1193-94. The following exchange occurred between the prosecutor and Mortensen:

> Q (prosecutor): After the threat was defused, you still had your gun, correct?
>
> A (Mortensen): I had my gun at my side.
>
> Q: And you pointed your gun at Joshua [McDonald]?
>
> A: I didn't even know where he was to point it at him.
>
> Q: You pointed your gun at Scott [Burkett]?

A: I never -- Scott, the threat was defused. I didn't need to point it at -- anywhere in that direction.

. . . . .

Q: And you pointed a gun at his [Burkett's] forehead and asked him if he wanted to die that night?

A: He wasn't anywhere near me.

Q: You did the same thing with Joshua. You pointed the gun at him and asked him if he wanted to die.

A: No.

RP 1193-94. Similarly, Nottingham testified that Mortensen had the gun in his hand at his side, pointing it at the ground and was not pointing it at either Burkett or McDonald. RP 905-906, 911. Nottingham also denied that Mortensen made any threats to Burkett and McDonald. RP 852, 855.

The testimony of both Mortensen and Nottingham show that there was sufficient evidence to support Mortensen's claim of self-defense as it relates to striking Burkett's nose with pistol. Hence the trial court properly instructed the jury on the law of self-defense as it relates to Count 1 (Assault in the Second Degree).

However Mortensen's and Nottingham's testimony do not provide any evidence to support instructing the jury on the law of self-defense, or defense of others as to the other counts of Assault in the Second Degree. Mortensen's and Nottingham's testimony amounted to a general denial

claim, rather than self-defense or defense of others. A defendant is entitled to a self-defense instruction only if he or she offers credible evidence tending to prove self-defense. *State v. Dyson*, 90 Wn. App. 433, 438, 952 P.2d 1097(1997), citing *State v. McCullum,* 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *State v. Hendrickson,* 81 Wn. App. 397, 401, 914 P.2d 1194 (1996). When a defendant claims a victim's injuries were the result of accident rather than caused by the defendant's acts, the defendant cannot claim self-defense. *Dyson*, 90 Wn. App. at 439, citing *State v. Gogolin*, 45 Wn. App. 640, 643, 727 P.2d 683(1986). The rationale underlying this is that a defendant is not entitled to have a certain jury instruction unless there is sufficient evidence to support a theory or defense. *Dyson*, 90 Wn. App. at 439, citing *State v. Theroff,* 95 Wn.2d 385, 389, 622 P.2d 1240 (1980). An instruction on an issue or theory not supported by the evidence is improper. *Gogolin*, 45 Wn. App. at 643, citing *State v. Gibson,* 32 Wn. App. 217, 223, 646 P.2d 786 (1982).

Analytically, the current case is similar to *Gogolin*, where the defendant was convicted of second degree assault for striking his ex-wife on the head several times with a revolver. 45 Wn. App. at 641-42. The defendant denied assaulting his ex-wife, and testified that he accidentally pushed her, causing her to fall and hit her head on the railing. *Id.* The defendant claimed that the trial court denied him due process by refusing

to give a self-defense instruction. *Id* at 643. The Court of Appeals affirmed the trial court's decision in refusing to instruct the jury on self-defense, because rather than claiming that he feared for his safety and pushing his ex-wife in self-defense, the defendant claimed that she accidentally fell and hit her head, hence there was no evidence to support giving of the self-defense instruction. *Id* at 643-44.

In the current case, Mortensen denied that he pointed the pistol at Burkett and McDonald. He also denied threatening to shoot them. Nottingham also testified similarly. Hence, there was no evidence to support giving the self-defense or defense of other instruction. Had Mortensen testified that he in fact did point his pistol at Burkett and McDonald because he was afraid of them attacking him or Nottingham, that would have presented a different scenario. But this was a straight denial. Therefore, because there was no evidence to support giving the defense of others instruction, the trial court did not err in refusing to give the instruction.

Mortensen may argue that the reason the trial court refused to give the defense of others instruction was not because there was no evidence to support giving the instruction, but rather because his trial counsel failed to include it in his set of proposed jury instructions, and the trial court simply wanted to move on with closing argument and get the case to the jury.

While this may be factually accurate, Mortensen's argument lacks legal support. As the record shows, the trial court would have committed error had it acquiesced to Mortensen's request to instruct the jury on the defense of others, because it was not supported by the evidence. In essence, the trial court made the correct decision for the wrong reason.

But when a party to an appeal is the respondent and seeks no affirmative relief that party is "entitled to argue any grounds supported by the record to sustain the trial court's order." *State v. Bobic,* 140 Wn.2d 250, 259, 996 P.2d 610 (2000); RAP 2.4(a), 5.1(d). In addition, a reviewing court "can affirm on any grounds supported by the record." *State v. Huynh*, 107 Wn.App. 68, 74 26 P.3d 290 (2001) (citing *State v. Bryant*, 97 Wn.App. 479, 490-91, 983 P.2d 1181 (1999)); *Bobic,* 140 Wn.2d at 259; RAP 2.4(a), 5.1(d). Furthermore, a reviewing court may affirm on any basis supported by the record whether or not the argument was made below. *Bavand v. One West Bank*, --- Wn.App. ----, 385 P.3d 233 (2016).

Here, as discussed above, the trial court made the correct ruling in refusing to give the defense of others instruction. The record supports the trial court's ruling, albeit on different grounds. This court should affirm the trial court's ruling.

Even assuming the trial court did err in refusing to give the defense of others instruction, the error was harmless beyond a reasonable doubt. "An error in instructions is harmless if it is 'trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.'" *State v. McCullum*, 98 Wn.2d 484, 497, 656 P.2d 1064 (1983). At trial, Mortensen urged the trial court to instruct the jury on the law of self-defense, pursuant to WPIC 17.02. This instruction was Instruction 16, which provides:

> It is a defense to a charge of Assault in the Second Degree that the force used or offered to be used was lawful as defined in this instruction.
>
> The force used or offered to be used upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.
>
> The person using or offering to use the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the force used or offered to be used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 153. Mortensen proposed this instruction at the time of trial. Because the evidence at trial also established that Mortensen and Nottingham may have been the primary aggressors in the incident, the Court also gave the aggressor instruction pursuant to WPIC 16.04. Instruction 18 provides:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense or defense of another and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense or defense of another is not available as a defense.

CP 155.

During closing argument, Mortensen's trial counsel argued vigorously that:

> An assault is only assault if it's done with unlawful force. If it's done with lawful force, it's not a crime. It might still be an assault, but it's not a crime. And there's a jury instruction here on self-defense. It's also -- it's a dual-purpose instruction. It's Instructions 16 and 17. Those are called "defenses." They are defense of self or another person. It's dual purpose. It's a little confusing from reading at it, but it's -- you can defend yourself or another person. If the person reasonably believes they're about to be harmed, they can use reasonable, necessary force to protect themselves or protect another person.
>
> And so what was reasonable here? Mr. Mortensen is being choked out. He's passing out. He's looking across the bay. He sees his wife. He sees his kids. He sees the fire. He thinks this is the last thing he's going to see. Under those

> circumstances, can a reasonable person protect themselves? Can they pull their gun if they have a gun?
>
> Mr. Mortensen said he didn't pull it. He couldn't. He said it got in the sand next to him and they wrestled over it, and that's how he got ahold of it. But is that a time when you can do it? If not then, when? This is the most we'd hope for.

RP 1503-04. Mortensen's trial counsel also argued that McDonald was the primary aggressor, and hence was not the victim. RP 1472. Clearly, the jury instructions allowed Mortensen to fully argue his theory of the case, namely self-defense and defense of others. And the jury's verdicts reflect that they did in fact accept Mortensen's theory that he was justified in coming to Nottingham's aid in his fight with McDonald. However, the jury's verdicts also demonstrate that Mortensen was the aggressor in the two counts of assault against Burkett, and hence was not entitled to claim self-defense. The exclusion of the defense of others instruction did not prejudice Mortensen, and would not have changed the out of the trial in this case. Assuming the trial court erred, the error was harmless beyond a reasonable doubt.

II. The trial court did not abuse its discretion in excluding the testimony of Aisha Nottingham on a minor point for violating the court's exclusion order.

Mortensen next argues the trial court erred in excluding Aisha Nottingham from testifying due to violating the trial court's exclusion order. Mortensen attempts to convert this evidentiary issue into a

constitutional one, and claims without support, that the trial court completely excluded Aisha Nottingham from testifying. Mortensen's claim is not supported by the record.

The decision to allow a witness to testify who has violated an order excluding witnesses lies within the broad discretion of the trial court, and will not be disturbed absent a manifest abuse of discretion. *State v. Dixon,* 37 Wn. App. 867, 877, 684 P.2d 725 (1984). Sanctions for a violation of an ER 615 exclusion ruling also lie within the trial court's exercise of sound discretion. *State v. Skuza*, 156 Wn. App. 886, 896, 225 P.3d 842 (2010). Abuse occurs when the trial court's discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

On the fourth day of trial, Mortensen called Aisha Nottingham to testify on his behalf. She testified about their relationship, as well as the events surrounding the incident on the beach. RP 913-981. During her testimony, Mortensen attempted to introduce that she heard un-named police officers make a threat that they would take all the adults to jail and call CPS to take the kids if they found out Mortensen's group had gone over to the other side of the channel. RP 951. The trial court sustained the State's objection for lack of foundation. RP 951. Later that afternoon,

Mortensen re-called Aisha Nottingham to testify about a phone call she made to her mother after the police dropped her off at her vehicle. RP 1046-47. Mortensen then took the stand to testify on his own behalf, and the trial recessed shortly thereafter. RP 1063. Outside the presence of the jury, the trial court allowed Mortensen to conduct an offer of proof, naming the two officers who he believed made the threats about taking everyone to jail and calling CPS. RP1066-67. The trial court reserved ruling on the issue until the next day. RP 1068. The next day, before Mortensen resumed his testimony, the trial court ruled that Mortensen could testify about the alleged threats that he heard. RP 1077. The trial court then noticed that Aisha Nottingham was present inside the courtroom, and specifically addressed Mortensen's trial counsel:

> THE COURT: . . . . And, Mr. Walker, I do see some witnesses in here. If they're going to be re-called for any reason, they can't be in here.
>
> MR. WALKER: I do not expect to re-call Aisha, Your Honor.
>
> THE COURT: Okay. And, specifically, Aisha Nottingham is here.
>
> MR. WALKER: I think she's the only witness in here -- former witness in here.
>
> THE COURT: Right.

RP 1080-81. This exchange occurred just minutes after the trial court's ruling, allowing Mortensen to testify about the alleged threats he heard. Aisha Nottingham then remained in the courtroom for the duration of Mortensen's testimony.

At the conclusion of Mortensen's testimony, Mortensen's trial counsel attempted to re-call Aisha Nottingham to testify about the alleged threats she heard the police made. The trial court denied Mortensen's request for deliberately violating the court's exclusion order. RP 1242. The following exchange took place between the trial court and Mortensen's trial counsel:

> MR. WALKER: Judge, I just want to make one last request. I request that I be allowed to recall Aisha Nottingham, and here's why: I attempted to elicit the same statement she heard on the beach when she was on the stand, and I was not allowed to because the ruling that –
>
> THE COURT: You mean this person that's sitting right back here –
>
> MR. WALKER: Yes. Yes.
>
> THE COURT: -- that I brought up earlier –
>
> MR. WALKER: I know.
>
> THE COURT: -- on today before this testimony started?
>
> MR. WALKER: I know. I know.
>
> THE COURT: Motion denied.

> MR. WALKER: Well, Judge, just because a person's in the courtroom does not make them –
>
> THE COURT: No. There's a motion in limine. I granted it. All witnesses are to be excluded. I gave you that opportunity, Mr. Walker.
>
> MR. WALKER: Yeah.
>
> THE COURT: I had you turn around, I had you look at her, and you said you were not going to re-call her as a witness. She sat through this whole proceeding. Motion denied.

RP 1239-40. The trial court explained further:

> THE COURT: . . . The issue with Ms. Nottingham yesterday was the fact that she heard this voice from the wind. I don't know. She didn't know who the officers were. There was no way for the State to rebut that kind of testimony. That's the reason that ruling was made at the time that it was made. Now we've had a situation where it's much like, I suppose, an invited error. I anticipated that very problem coming up with Ms. Nottingham sitting in the courtroom listening to all this testimony. I specifically asked you, is there a problem with that witness being in the courtroom. You specifically said, no, I don't plan to re-call her. So based on that, you've left me with no other choice but to deny an opportunity for her to be called -- re-called as a witness.

RP 1241-42. The record is abundantly clear – Aisha Nottingham was not completely excluded from testifying on Mortensen's behalf. She testified fully about her background and relationship with Mortensen, as well as the events that occurred on the river. The only part of her testimony that Mortensen was unable to introduce was the alleged threats that she claimed she heard from un-named police officers. The trial court based its

ruling on Mortensen's trial counsel deliberately violating the court's witness exclusion order. The trial court's ruling is amply supported by the record and case law. The trial court did not abuse its discretion.

But even assuming the trial court abused its discretion and erred on this evidentiary issue, the error was harmless. In determining whether such error is harmless beyond a reasonable doubt, this Court applies the overwhelming untainted evidence test. *State v. Mayer*, ___ Wn.2d ___, 362 P.3d 745, 754 (2015). Here, the jury already knew that Mortensen and Nottingham had crossed the channel in Mortensen's boat to the north bank and there was a fight on the north bank where Mortensen had struck Burkett on the nose and broke it. The jury had also seen photos and physical evidence that show the fight took place on the north bank, and that Mortensen's pistol was buried in the sand behind one of the tents on his side of the channel. The jury also heard testimony from McKernan and Hoffman that they heard Mortensen's group hold a family meeting after Mortensen and Nottingham returned to their side of the channel and fabricated a story to tell the police. Finally, the jury heard testimony from Huddleston, Nottingham, Aisha Nottingham, and Mortensen, all admitting that they lied to the police about how and where the fight took place. All of this damning evidence overwhelmingly proves that Mortensen and Nottingham crossed the channel to the north bank. Any claim by Aisha

Nottingham that the only reason she lied to the police about how and where the assault took place was because she heard this threat from the police, would not have changed the outcome of this trial. This court should reject Mortensen's claim.

III. Mortensen received effective assistance of counsel.

Mortensen advances two arguments in contending that his trial counsel rendered ineffective assistance of counsel: 1) his trial counsel failed to include in his proposed jury instructions the law on defense of others, and 2) his trial counsel failed to keep Aisha Nottingham outside the courtroom in anticipation of re-calling her to testify about the threats made by the police officers. Mortensen's claims are meritless.

A defendant has the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That said, a defendant is not guaranteed successful assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The defendant must make two showings in order to demonstrate ineffective assistance: (1) that counsel's performance was deficient and (2) that counsel's ineffective representation resulted in prejudice. *Strickland*, 466 U.S. at 687. The defendant's failure to prove either prong ends further inquiry. *State v. Hendrickson,* 129 Wn.2d 61, 78, 917 P.2d 563 (1996). A court reviews the entire record when considering an allegation of

ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). Moreover, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 689).

1. Deficient Performance

The analysis of whether a defendant's counsel's performance was deficient starts from the "strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *State v. Hassan*, 151 Wn.App. 209, 217, 211 P.3d 441 (2009) ("Judicial scrutiny of counsel's performance must be highly deferential.") (quotation and citation omitted). Thus, "given the deference afforded to decisions of defense counsel in the course of representation" the "threshold for the deficient performance prong is high." *Grier*, 171 Wn.2d at 33. This threshold is especially high when assessing a counsel's trial performance because "[w]hen counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Id.* (quoting *Kyllo*, 166 Wn.2d at 863); *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) ("[T]his court will not find ineffective assistance of

counsel if the actions of counsel complained of go to the theory of the case or to trial tactics." (internal quotation omitted)). On the other hand, a defendant "can rebut the presumption of reasonable performance by demonstrating that 'there is no conceivable legitimate tactic explaining counsel's'" decision. *Id.* (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

2. Prejudice

In order to prove that deficient performance prejudiced the defense, the defendant must show that "counsel's errors were so serious as to deprive [him] of a fair trial. . . ." *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 687). In other words, "the defendant must establish that 'there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.'" *Id.* at 34 (quoting *Kyllo*, 166 Wn.2d at 862).

"In assessing prejudice, 'a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law' and must 'exclude the possibility of arbitrariness, whimsy, caprice, nullification and the like.'" *Id.* (quoting *Strickland*, 466 U.S. at 694–95). Moreover, when juries return guilty verdicts reviewing courts "must presume" that those juries actually found

the defendants "guilty beyond a reasonable doubt" of those charges. *Id.* at 41.

a. Mortensen was not denied effective assistance of counsel for failing to propose the defense-of-others language in the jury instructions.

As previously discussed in section I, there was no evidence in the record to support the defense of others instruction. The trial court correctly ruled that the defense of others instruction was not applicable in this case. As such, Mortensen's trial counsel was not deficient in failing to submit that instruction.

Furthermore, Mortensen was not prejudiced by his trial counsel's failure to propose the defense of others instruction. The key issue in this case was whether the State could prove that Mortensen was the aggressor. By proving that Mortensen was the aggressor, his self-defense and defense of others claim became irrelevant. There was overwhelming evidence that Mortensen was the aggressor who instigated the confrontation as it related to the two assault charges on Burkett. Furthermore, the jury's verdicts demonstrate that they accepted Mortensen's theory that he was justified in coming to Nottingham's aid in his fight with McDonald. Instructing the jury on the defense of others would not have changed the outcome of this trial. Mortensen cannot demonstrate that he was prejudiced.

b. Mortensen was not denied effective assistance of counsel for his trial counsel's failure to keep Aisha Nottingham outside the courtroom in anticipation of re-calling her.

Mortensen argues that his trial counsel rendered ineffective assistance of counsel because he should have anticipated the need to re-call Aisha Nottingham to testify about the threats that she heard the police made. The record demonstrates that the decision by Mortensen's trial counsel in purposely leaving Aisha Nottingham in the courtroom during Mortensen's testimony was purely for tactical reasons.

The intent of Mortensen's trial counsel for having Aisha Nottingham remain in the courtroom during Mortensen's testimony was an attempt at garnering sympathy from the jury. Mortensen's trial counsel wanted to show the jury that Mortensen had a family who supported him, that he was a mature and responsible family man, and that he would never engage in irresponsible conduct that the State had alleged. This was made abundantly clear in Mortensen's trial counsel's closing argument, where he attempted to portray Mortensen as a mature and responsible gun owner. RP 1468-71. As our courts have ruled, a trial counsel's performance is not deficient if it is based on legitimate trial strategy or tactics. *Hendrickson*, 129 Wn.2d at 77–78.

Furthermore, Mortensen cannot demonstrate that the result of the trial would have been different had Aisha Nottingham been allowed to testify about the threats she heard. As previously discussed, this point is so minor in comparison with the overwhelming weight of the evidence that proved Mortensen and Nottingham crossed the channel to assault Burkett's group. The record demonstrates that the result of the trial court would not have been different had Aisha Nottingham been allowed to testify about the alleged threats. Mortensen was not prejudiced; the second prong of the *Strickland* test is not met. Consequently, Mortensen has not established ineffective assistance of counsel in violation of the Sixth Amendment.

IV. The reasonable doubt instruction was the correct statement of the law.

Mortensen argues the trial court erred in giving the standard beyond a reasonable doubt instruction as found in WPIC 4.01 because it shifted the burden of proof and undermined his presumption of innocence. The trial court properly used WPIC 4.01 to instruct the jury, and this instruction did not shift the burden of proof or undermine Mortensen's presumption of innocence. The trial court should be affirmed.

At trial, Mortensen did not object to the propriety of WPIC 4.01. RP 1339-40. A defendant generally waives the right to appeal an error

unless he or she raised an objection at trial. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). One exception to this rule is made for manifest errors affecting a constitutional right. RAP 2.5(a)(3); *Kalebaugh*, 183 Wn.2d at 583. An error is manifest if the appellant can show actual prejudice. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). Mortensen claims an error of constitutional magnitude in assigning error to the trial court's use of a particular instruction for the burden of proof. However, Mortensen fails to show either error or prejudice in the court's giving of this instruction.

"Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." *State v. Pirtle,* 127 Wn.2d 628, 656, 904 P.2d 245 (1995). "It is reversible error to instruct the jury in a manner that would relieve the State of this burden." *Pirtle,* 127 Wn.2d at 656. This Court reviews a challenged jury instruction de novo. *Id.* The challenged instruction must be evaluated in the context of all the instructions as a whole. *Id.* "We review a challenged jury instruction de novo, evaluating it in the context of the instructions as a whole." *Pirtle,* 127 Wn.2d at 656. Jury instructions are upheld if they allow the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the

applicable law. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

Mortensen challenges WPIC 4.01, an instruction which has never been held to be improper. In fact, our State Supreme Court directed trial courts to use this instruction to instruct juries on reasonable doubt. *Bennett*, 161 Wn.2d at 318. The trial court below used WPIC 4.01, and made no amendments, additions, or deletions to the standard instruction. CP 142. Mortensen argues that despite this mandate from our State Supreme Court, the instruction informs jurors that they must be able to articulate their doubt, essentially filling in the blank as to why they find a defendant not guilty. Br. Of Appellant, p. 33.

Our courts have approved the language of WPIC 4.01 as constitutionally valid for many years. In *State v. Thompson*, 13 Wn. App. 1, 533 P.2d 395 (1975), the Court on appeal considered the phrase "a doubt for which a reason exists" and found this statement does not direct the jury to assign a reason or reasons for their doubts, but simply points out that their doubts must be based on reason, and cannot be something vague or imaginary. *Thompson*, 13 Wn. App. at 5. In fact, the *Thompson* Court stated, "[a] phrase in this context has been declared satisfactory in this jurisdiction for over 70 years." *Id.* (citing *State v. Harras*, 25 Wn. 416, 65 P. 774 (1901)). Adding the 41 years that have passed since *Thompson*

was issued, our jurisdiction has now approved this language for well over a century.

Mortensen cites to *Kalebaugh*, *supra* to support his argument that the instruction given below improperly shifted the burden of proof. In *Kalebaugh* the trial court gave a proper WPIC 4.01 instruction on beyond a reasonable doubt, but in its preliminary comments the court attempted to further explain the instruction by telling the jury that it meant "a doubt for which a reason can be given." *Kalebaugh*, 183 Wn.2d at 585. The Supreme Court did not like the trial court's "offhand explanation," but found the error was harmless as the court went on to properly instruct the jury, using WPIC 4.01, at the end of the case. *Id.* at 586.

Mortensen also cites to *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012) to support his argument. In *Emery*, the prosecutor argued in closing argument that "in order for you to find the defendant not guilty ... you'd have to say, quote, I doubt the defendant is guilty, and my reason is blank. ... If you think you have a doubt, you must fill in that blank." *Emery*, 174 Wn.2d at 750-51. This statement by the prosecutor did shift the burden of proof to the defendant to disprove his guilt. However, the Supreme Court found this argument was harmless error as the trial court properly instructed the jury on the reasonable doubt standard, via WPIC 4.01, and the appellant could not show the prosecutor's argument affected

the jury's verdict. *Id.* at 762-63. Though *Emery* did not involve an argument about the appropriateness of the language in WPIC 4.01, it shows the Supreme Court's continued approval of WPIC 4.01, even for the language that Mortensen now objects to of "a doubt for which a reason exists...." Our State Supreme Court has consistently approved the use of WPIC 4.01 in criminal jury trials, and even directed trial courts to use it. The trial court below properly instructed the jury on the reasonable doubt standard, and our State's jurisprudence shows this instruction is constitutionally firm and appropriate.

Based on our Courts' past approval of WPIC 4.01 for instructing a jury on the reasonable doubt standard, this court should affirm the trial court's giving of this instruction. The principle of *stare decisis* requires that when an issue has been previously decided, it cannot be overturned absent a finding that the prior decision is both incorrect and harmful. *State v. Lucky,* 128 Wn.2d 727, 735, 912 P.2d 483 (1996). This principle "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)). The trial court below followed our Supreme Court's directive in *Bennett, supra.*

V. One of Mortensen's two convictions for Assault in the Second Degree pertaining to Scott Burkett should be dismissed

For purposes of this appeal, the State concedes that one of Mortensen's two Assault in the Second Degree convictions should be dismissed. The jury convicted Mortensen of two counts of Assault in the Second Degree pertaining to Scott Burkett (Counts 1 and 2). CP 172-73. The jury also returned a special verdict for Count 2, finding that Mortensen was armed with a firearm in the commission of the crime. CP 174. Based on an offender score of zero, Mortensen's standard range base sentence for Assault in the Second Degree is three to nine months. The firearm special verdict carries an additional 36-month sentence enhancement. Mortensen's adjusted standard range sentence with the firearm enhancement is 39 to 45 months. The trial court imposed a standard range sentence of 45 months for Count 2. CP 191. Mortensen does not assign error to this sentence. Based on the State's concession, this court should remand this case to the trial court to dismiss Count 1 and correct the judgment and sentence.

VI. The Judgment and Sentence should be amended to reflect that Mortensen was convicted by jury verdict.

The State concedes that there is a scrivener's error on the judgment and sentence in this case. Mortensen's judgment and sentence reflects

"The defendant is guilty of the following offenses, based upon [X] guilty plea 11/24/2015." CP 188. Mortensen was convicted by jury verdict. CP 172-74. This court should remand this case to correct this error.

VII. The trial court did not err in imposing the $200 filing fee.

Mortensen argues that the trial court erred in imposing a $200 criminal filing fee without inquiring into his financial conditions or ability to pay. Br. of App at 39. Mortensen mischaracterizes the criminal filing fee as discretionary, rather than mandatory.

This court has already dealt with this issue, and has ruled that restitution, victim assessments, DNA fees, and criminal filing fees are mandatory fees that the legislature has expressly directed that courts have no discretion to consider the offender's ability to pay. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). Our State Supreme Court recently noted with approval that this court treated the filing fee imposed by RCW 36.18.020(2)(h) as mandatory. *State v. Duncan*, 185 Wn.2d 430, 436 n.3, 374 P.3d 83 (2016). Despite this, Mortensen contends that this court wrongly decided *Lundy*, and urges this Court to overrule itself. This court should decline Mortensen's invitation.

VIII. This court should decline to rule on the issue of appellate costs as it is not ripe.

Mortensen asks this court to deny the State's request for appellate costs. He argues under *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612, *review denied*, 185 Wn.2d 1034, ___ P.3d ___ (2016) that this Court should not impose any appellate costs if the State substantially prevails on this appeal as he is indigent. The State respectfully requests this Court refrain from ruling on the cost issue until it is ripe.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997); *State v. Mahone*, 98 Wn.App. 342, 989 P.2d 583 (1999). The award of appellate costs to a prevailing party is within the discretion of the appellate court. *Sinclair*, 192 Wn. App. at 386; *see* RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). However, the appropriate time to challenge the imposition of appellate costs should be when and only if the State seeks to collect the costs. *See Blank*, 131 Wn.2d at 242; *State v. Smits*, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing *State v. Baldwin*, 63 Wn. App. 303, 310-11, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability

to pay is clearly somewhat speculative. *Baldwin*, at 311; *see also State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." *Blank*, 131 Wn.2d at 241–242. *See also State v. Wright*, 97 Wn. App. 382, 965 P.2d 411 (1999). The procedure created by Division I in *Sinclair, supra*, prematurely raises an issue that is not yet before the Court. Mortensen could argue at the point in time when and if the State substantially prevails and chooses to file a cost bill.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to do away with requirement.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel." Obviously, all these

defendants have been found indigent by the court. Under Mortensen's argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160.

In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Court indicated that trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as *Sinclair* points out, the Legislature did not include such a provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." *See* RCW 10.73.160(4).

In this case, the State has yet to "substantially prevail" and has not submitted a cost bill. In addition, at the time of sentencing, the trial court found that Mortensen was "presently indigent but is anticipated to be able to pay financial obligations in the future." CP 190; RP 1554-55. This finding is supported by the representation by Mortensen's trial attorney to the trial court in his request for a post-conviction bond pending sentencing that "He's got good support in the area. He's got a job." RP 1535. Hence, Mortensen's indigency status is subject to change. The State respectfully requests this Court wait until the cost issue is ripe, if it ever becomes so, before ruling on this issue.

CONCLUSION

With the noted exceptions, Mortensen's assignments of error lack merit. The trial court should be affirmed.

DATED this 3rd day of February, 2017.

Respectfully submitted:

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CLARK COUNTY PROSECUTOR

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